In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 392

H. K. PORTER COMPANY, INC., DISSTON DIVISION—DANVILLE WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24-44) is not yet officially reported. The Board's decision and order (J.A. 45-54, 58-59)[1] are reported at 153 NLRB No. 119.

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[1] References designated "J.A." are to the joint appendix filed in the court below.

JURISDICTION

The judgment of the court of appeals were entered on May 19, 1966 (Pet. 45-46). The petition for a writ of certiorari was filed on July 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company refused the Union's request for a checkoff of union dues, not in good faith, but in order to prevent an agreement with the Union.

STATEMENT INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

On October 5, 1961, following its victory in a Board election, the Union [2] was certified as the collective bargaining representative of the approximately 300 production and maintenance employees at petitioner Company's Danville, Virginia, plant (J.A. 45-46; 17-18, 39, 42).[3] The Company and the Union

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[2] United Steelworkers of America, AFL-CIO.

[3] The Union maintains no office in Danville, that area being serviced from the Union's office in Roanoke, a distance of about 83 miles (J.A. 46).

met 28 times for the purpose of negotiating a contract, but failed to reach an agreement (J.A. 46). Upon charges filed by the Union, the Board found that the Company, acting through Plant Manager Jones, had failed to bargain in good faith by, *inter alia*, adamantly refusing to agree to an arbitration provision while insisting that any contract contain a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times (J.A. 46). The Board ordered the Company to cease its illegal conduct and to bargain in good faith with the Union, and, on July 17, 1964, the United States Court of Appeals for the Fourth Circuit granted summary enforcement of the Board's order (J.A. 46).[4]

The present proceeding involves the Board's subsequent finding that the Company refused to bargain in good faith during the negotiations which resumed on October 23, 1963, about a month after the issuance of the Trial Examiner's Decision in the earlier case (J.A. 47, 49; 12-13). Between that date and September 10, 1964, when negotiations ceased, 21 meetings took place, but again no agreement was reached (J.A. 47; 13-14, 44).

When the negotiations broke off, three items remained unresolved: wages, health and life insurance, and checkoff—that is, the deduction of union dues by the Company from employees' paychecks (J.A. 47; 14-15). A checkoff was discussed at virtually all of the 21 meetings, and each time the Company rejected

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[4] The Company did not except to the Trial Examiner's findings, conclusions, and recommended order (J.A. 46).

the Union's request, claiming that the collection of dues was the "union's business" which the Company would not foster or promote (J.A. 47; 17, 27-28). In an effort to reach accord, the Union, on several occasions, offered to withdraw its checkoff request if the Company would permit either the Union's stewards, or its financial secretary, to collect dues, when they became due, in nonworking areas of the plant during nonworking hours (J.A. 47; 17, 23). The Company also rejected these alternative proposals, on the ground that it would not "aid and comfort the International at this location" by allowing the Union to collect dues at any time on Company property (J.A. 47; 16-17, 27-30, 33-35).

At the hearing before the Board, Jones, the Company's plant manager and chief negotiator (who also had represented it in the previous conferences), explained that the Company had no policy against permitting checkoff or dues collection on its premises, and that the rejection of the Union's proposals was his own decision as "top man" at the Danville plant (J.A. 48; 25, 28). Jones admitted that the Company had collective bargaining agreements with unions at other plants, which contain checkoff provisions (*ibid.*). He also stated that his objection to a checkoff, and to the Union's alternative proposals, was not based upon "any inconvenience to the company"; he indicated that the Company regularly made periodic payroll deductions at its Danville plant for a variety of purposes, including the purchase of United States Savings Bonds, health and life insurance coverage for employees' dependents, and contributions to the Unit-

ed Givers Fund and a "Good Neighbor Fund" (J.A. 48; 25-28, 44).[5]

On the basis of the foregoing facts, the Board, adopting the trial examiner's decision and recommended order (J.A. 58), held that the Company failed to bargain in good faith about a check-off, in violation of Section 8(a)(5) and (1) of the Act (J.A. 50-51, 58). The Board found that the Company's intransigent position with respect to check-off, and its rejection of the Union's substitute proposals, was motivated not by good faith considerations but by a desire to frustrate agreement with the Union (J.A. 49). The examiner found, based on Jones' demeanor as a witness, that Jones had not abandoned the hostile attitude which he had displayed toward the Union in the earlier negotiations, but continued to regard the Union as "an evil to tolerate" (*ibid.*). The examiner also pointed out that the Company had conceded that a check-off imposed no burden on it, and that it had check-off provisions in its other contracts (J.A. 50). The Board's order (J.A. 51-53) directs the Company to cease and desist from the unfair labor practice found, and to bargain with the Union upon request.

The court of appeals (Judge Wilbur K. Miller dissenting) held that the Board's findings were supported by substantial evidence, and enforced the order (Pet. 24-44).

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[5] The Good Neighbor Fund, which was a weekly payroll deduction of 10 cents to pay for gifts for hospitalized employees, plant parties, special charitable donations and the like, had been discontinued about a year prior to the hearing herein (J.A. 48, n. 7; 26).

ARGUMENT

As the court below recognized (Pet. 25), the sole question is whether substantial evidence supports the Board's finding that the Company refused the Union's request for a check-off of union dues, not in good faith, but in order to prevent an agreement with the Union. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, in the light of the Company's past history of bad faith bargaining, its admission that the refusal to check off union dues at the Danville plant was not based on inconvenience but simply on its unwillingness to give "aid and comfort" to the Union, and the fact that it had granted a checkoff in contracts covering its other plants (see pp. 3-5, *supra*), the Board was amply warranted in concluding that it refused a checkoff at Danville merely to block an agreement at that plant.

Nor is the Board's decision in this case contrary to the admonition in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404, that the Board shall not "compel concessions" or "sit in judgment upon the substantive terms of collective bargaining agreements." As the court below pointed out (Pet. 31-32), although the Company "cannot be compelled to agree to a proposal or make a concession," a "refusal to make concessions [cannot] be used 'as a cloak * * * to conceal a purposeful strategy to make bargaining futile * * *.'" (quoting from *National Labor Relations Board* v. *Herman Sausage Co.*,

275 F. 2d 229, 232 (C.A. 5)). On the findings of the Board, sustained by the court below, the Company's refusal to grant the Union a checkoff was such a "cloak."

Similarly, the Board's order in this case did not violate the provision of Section 8(d) of the Act that the statutory duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession * * *." The Board's order merely directs the Company to bargain with the Union. The Board rejected the Union's request to include a provision "requiring the company to withdraw its objection to the dues check-off" (Pet. 30), and the court of appeals upheld that ruling (Pet. 30-33).

To be sure, the court of appeals stated (Pet. 32) that it was "clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off." It may well be, in view of "the entire record of this company's performance at the bargaining table" (Pet. 33), that the Company would be unable to justify, as a defense in a contempt proceeding, any further adamant refusal to grant either a check-off or one of the Union's alternative suggestions for facilitating collection of dues. In other words, the Company's past refusal to bargain may have been so egregious that it can now demonstrate its good faith only by making some concession to the Union's demands on this subject. However, even in that event, the Company would be doing so not because of any compulsion of the court of appeals, but because its own "perform-

ance at the bargaining table" made such a concession the only convincing way by which it could demonstrate its good faith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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No. 392

H. K. PORTER COMPANY, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION[1]

COUNTER-STATEMENT OF THE CASE

The facts of this case are substantially undisputed.

The Union, which was the charging party before the Board, was certified as the bargaining representative of the production and maintenance employees of the Company's Danville, Virginia plant on October 5, 1961. The Union's five year attempt to obtain a collective bargaining agreement has thus far been unavailing.

[1] The petition for certiorari, in its caption, does not list United Steelworkers of America (AFL-CIO) (hereinafter "the Union") as a respondent herein. The Union was a party below, however, and therefore is automatically a respondent herein.

The "bargaining" which took place during the thirteen months between the date of certification and November 27, 1962 was the subject of a prior unfair labor practice proceeding. *H. K. Porter Co.,* Case No. 5-CA-2785. The Trial Examiner found, in that case, that the Company had failed to bargain in good faith.[2] The Company filed no exceptions to the Trial Examiner's decision; it was adopted by the Board; and the Board's order was enforced by the United States Court of Appeals for the Fourth Circuit (No. 9504, unpublished; issued July 17, 1964).

During most of 1963, the Company refused to meet with the Union at all. After the Trial Examiner's decision in the first case issued, on September 20, 1963, the Company returned to the bargaining table and during the next twelve months 21 more meetings were held. (J.A. 44, 47). The present case involves the Company's conduct at these meetings.

At the outset of this new round of meetings, there were fourteen issues in dispute. By the last meeting, there were only three—checkoff, insurance, and wages. (J.A. 47, 14-15). With one exception, the disputed issues were resolved only because the Union withdrew its demands. (J.A. 15). During the entire course of the negotiations between these parties, the Company has made only one concession—and that was a concession which it was required to make by reason of the Board's order in the prior proceeding. The Trial Examiner in that case had held, *inter alia,* that it was an unfair labor practice for the Company to insist on a no-strike

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[2] The violations found by the Trial Examiner in that case consisted of over-all bad faith bargaining, unilateral changes in terms and conditions of employment, and insistence on a no-strike clause coupled with a refusal to grant any form of grievance arbitration. The Trial Examiner concluded, *inter alia,* that the Company "was demanding in effect that the Union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the Company's actions were designed to "subvert the Union's position as the statutory representative."

clause and simultaneously to refuse to agree to any arbitration procedure for resolving grievances. The Company, which did not challenge that decision, became legally obligated to comply with it either by agreeing to provide some form of grievance arbitration or by dropping its demand for a no-strike clause. Yet it was not until the 20th meeting, which took place ten months after the Trial Examiner's decision, that the Company finally withdrew its demand for a no-strike clause. (J.A. 15-16).

While this delay is itself evidence of the Company's continuing bad faith, and was so regarded by the court below (A27), the present proceeding also involved another aspect of the bargaining. Throughout the bargaining, a key issue has been the Union's request for the "checkoff"—i.e., the deduction by the Company of union dues from the wages of employees who voluntarily authorize such deductions in writing pursuant to Section 302 of the Labor Management Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. § 186. The Company has consistently and adamantly refused to agree to this request (J.A. 47).

In its meetings with the Union, the Company gave only one reason for its refusal to agree to the checkoff—that the collection of union dues is "union business." (J.A. 16, 28). At the hearing, the Company explained that "we were not going to aid and comfort the International Union at this location," (J.A. 34, 31, 35), and its counsel acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

The Company admitted at the hearing that it has made deductions from employees' wages for other purposes including the purchase of United States Savings Bonds, the purchase of optional insurance coverage for employees' dependents, contributions to the United Fund, and contributions to a so-called "Good Neighbor Fund" (which was administered by the employees, prior to their unionization, for parties, charitable donations, gifts to employees who are hospital-

ized or who suffer a loss in the family, etc.). None of these deductions is required by law. (J.A. 25, 27, 44).

The Company also admitted that there would be no inconvenience involved in checking off union dues (J.A. 28), and that in fact it does check off union dues at some of its other plants (J.A. 32).

The Trial Examiner found that the Company had engaged in bad-faith bargaining in violation of Sections 8(a)(5) and (1). (J.A. 48-51). He concluded from all the evidence in the record, that the Company's sole reason for refusing the checkoff was to "frustrate agreement with the Union." (J.A. 49). The Company's explanation for its position—that it did not wish to give aid and comfort to the Union—was held by the Trial Examiner to "evidence an attitude inconsistent with the obligation imposed . . . by the act" to bargain in good faith and with a sincere desire to make an agreement (Ibid.). The Board issued a "short form" order affirming the Trial Examiner in all respects, and ordering the Company to bargain in good faith.

The Company petitioned for review to the court below, challenging the Board's finding that it had violated the Act. The Union also petitioned for review, contending that the Board's order was not adequate to remedy the violation, and that in the circumstances of this case the Company should be ordered to withdraw its resistance to the checkoff. The court below denied both petitions, and enforced the Board's order, but in its opinion interpreted the Board's order as requiring the Company to withdraw its resistance to checkoff, thus providing relief equivalent to that sought by the Union in its petition for review.

ARGUMENT

The petition for certiorari contains three "questions presented." Two of these (numbered "1" and "3") involve the correctness of the determination that the Company violated Section 8(a)(5) of the Act by failing to bargain in good

faith. The third (numbered "2") involves the propriety of the remedy prescribed for that failure. As we show herein, none of these questions is worthy of this Court's attention, and, as to the last, there is a serious question whether this Court has jurisdiction.

A. Questions Involving the Correctness of the Determination that the Company Violated Section 8(a)(5) (Questions Presented Nos. 1 and 3).

The Company seeks to litigate in this Court questions which were not in issue in the court below. The petition for certiorari challenges the *legal* sufficiency of the Board's finding that the Company violated Section 8(a)(5). In the court below, however, the Company challenged only the *factual* support for that finding.

In a prehearing conference stipulation filed by the parties, and approved by the court below, its was stipulated that the sole "question presented" by the Company's petition to review was:

> "[W]hether substantial evidence on the whole record supports the Board's finding that the Company failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act." (J.A. 1-2).

This stipulation had the effect, under the rules of the court below, of "strictly limiting" the issue to the sufficiency of the evidence. *International Brotherhood of Boilermakers,* 259 F.2d 957 (D.C. Cir. 1958); Rule 38(k), Rules of U.S. Court of Appeals for the District of Columbia.[3]

The majority below was convinced "that the Board's findings are supported by substantial evidence on the record considered as a whole" (A26). Judge Miller dissented because

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[3] [H]ereafter, in cases affected by Rule 38(k), counsel will be strictly limited to the issues made by them with the approval of the court, except in extraordinary circumstances 'to prevent manifest injustice.'" *Int'l Bhd. of Boilermakers, supra,* 259 F.2d at 958.